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Chairman: Mr. Tulbure ..... (Moldova)

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The meeting was called to order at 10.10 a.m.

Agenda item 82: Report of the International Law Commission on the work of its fifty-ninth session (*continued*) (A/62/10)

1. **Mr. Makarewicz** (Poland) said that the proper choice of new topics to be included in the Commission's programme of work was essential in order for the Commission to make its best contribution. The new topics "Protection of persons in the event of disasters" and "Immunity of State officials from foreign criminal jurisdiction" fully merited elaboration by the Commission for the alleviation of human suffering and for the sake of stable relations among States.

2. However, his delegation doubted that the Commission's reconsideration of the topic "Most-favoured nation clause" was justified. The draft articles on that topic adopted by the Commission in 1978 had focused on the clause in bilateral relations, whereas since then the clause had been increasingly utilized in multilateral relations, generally involving free-trade zones and trade groupings, usually under the legal umbrella of the General Agreement on Tariffs and Trade (GATT) and, since 1994, of the World Trade Organization (WTO). The current global regulatory system developed within the WTO framework for the application of the most-favoured-nation clause was autonomous, and the older rules evolved on the basis of bilateral relations would have little relevance. Of the States playing a significant role in international trade only a few remained outside the WTO system, and even those were well advanced in talks on accession. Moreover the provisions of the 1978 draft articles concerning relations between developed and developing States were currently largely of historical value. Even in non-commercial relations, most-favoured-nation standards were currently being elaborated in line with changing needs in a way not necessarily compatible with the traditional standards of the 1978 text. In the light of the foregoing, his delegation saw no value in the Commission's reconsidering a regime better dealt with in other forums or on a case-by-case basis.

3. With reference to relations between the Commission and Member States, it was worth mentioning the annual meetings of legal advisers from ministries of foreign affairs, in which Commission members participated actively and established a valuable dialogue. On other matters, his delegation supported restoring honorariums for special rapporteurs to facilitate their research work and agreed that an a priori limitation could not be placed on the length of the Commission's documentation.

4. The coming sixtieth anniversary of the Commission could in a sense best be honoured by the continued discussion of the rule of law in international relations. However, the invaluable legacy of the Commission was the work of all its members, past and current, and it was proper for all former members to be invited to the formal commemoration. In addition, an agenda item entitled "The sixtieth anniversary of the International Law Commission" should be included in the agenda for the sixty-third session of the General Assembly.

5. **Ms. Belliard** (France) said that the Commission's work was very valuable, but care should be taken to ensure that the large number of new topics, however interesting and timely, did not hamper the completion within a reasonable period of time of topics already under consideration.

6. With regard to the topic of responsibility of international organizations, her delegation agreed that there was no reason for departing from the principles set forth in the articles on the responsibility of States concerning the consequences of an internationally wrongful act. However, draft article 43 on ensuring the effective performance of the obligation of reparation raised more questions than it answered. The previous year a number of delegations, including her own, had rejected the idea that member States had subsidiary responsibility for the internationally wrongful act of an international organization. The Commission had nonetheless introduced a provision the meaning and status of which were unclear. If the intent was simply to recall the obligations of member States under "the rules of the organization", it would add very little value and seemed out of place in a text concerned with the responsibility of international organizations. If, on the other hand, the intention was to go beyond a simple reminder of the general duty of cooperation deriving from membership, draft article 43 might call into question the essence of the legal personality of international organizations.

7. The Commission's work at its fifty-ninth session on the effects of armed conflicts on treaties showed that fundamental questions remained unresolved. In

terms of general approach, the Commission should not ignore the practical in favour of the theoretical. The scope of the draft articles, defined in draft article 1, should include treaties to which international organizations were parties; it seemed unnecessary to divide the topic, as had been done with the law of treaties and the responsibility of States and international organizations. Moreover, the topic should not be limited to treaty relations between the States parties to armed conflict but should also cover the effects of an armed conflict on treaties to which non-belligerent States were parties. A similar concern to deal with the situations most commonly encountered in practice would justify including non-international armed conflicts within the definition of "armed conflict" given in draft article 2. The definition should also cover occupation in the course of an armed conflict, and it might be advisable to combine draft articles 1 and 2, since the definitions were actually about scope.

8. Draft article 3 setting forth the principle of continuity of treaties should meet with general approval, but, as currently worded, it was not clear which of two questions it was answering: whether the outbreak of an armed conflict could never, necessarily or *ipso facto*, terminate a given treaty or what treaties could never be suspended or terminated as a result of an armed conflict. As she understood it, the general thrust of the draft article was to state that the outbreak of an armed conflict would have different consequences depending on the treaty and to affirm that the continuity of treaties was to be preferred. Greater clarification was needed, possibly in a separate draft article, as to the precise legal nature of the effect of armed conflicts on treaties susceptible to termination or suspension.

9. The reference in draft article 8 to articles 42 to 45 of the 1969 Vienna Convention on the Law of Treaties seemed unclear; more clarification was needed on the relation between the topic at hand and the rules of the Vienna Convention on termination and suspension. In addition, the way in which international law on resort to force applied to the operation of treaties should be elaborated more fully in draft article 10.

10. Having spoken on the issue the year before, her delegation was concerned that the only criterion proposed in draft article 4 for determining the susceptibility to termination or suspension of treaties in case of an armed conflict was still the original intention of the parties, without regard for other factors relating to the nature of the treaty and the nature of the armed conflict, and it welcomed the recommendations of the Commission's Working Group in that regard. Draft article 7 containing a list of treaties the object and purpose of which involved the necessary implication that they should continue in operation during an armed conflict should be brought closer to draft article 4. Somewhere, in a draft article, in an annex or in the commentary, the Commission should determine how to characterize such treaties. Lastly, her delegation agreed that draft article 6 bis should be deleted, since its content went beyond the limits of the topic.

11. On the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*), a decision about the final form the work should take would depend on the substantive results. The Commission should seek to determine the source, whether customary or conventional, of the obligation in relation to certain grave offences such as torture, war crimes, genocide, crimes against humanity and terrorism. To do so would require an exhaustive study of practice, particularly national legislation and the jurisprudence of domestic criminal courts, as well as provisions on the obligation to extradite or prosecute contained in numerous international agreements. It would also be of interest to consider the different ways of handling the alternative offered by the adage "*aut dedere aut judicare*".

12. She had some difficulty in understanding the insistence in linking the question of universal jurisdiction to the obligation to extradite or prosecute. Universal jurisdiction was a facile phrase that concealed major doctrinal disagreements. It would be advisable to take an inductive approach, beginning with the exact nature of the obligation to extradite or prosecute, its content and how it was carried out, before attempting to establish *in abstracto* the relationship between the obligation and the concept of universal jurisdiction. Lastly, her delegation approved of the decision of the Special Rapporteur to refrain from examining further the so-called "triple alternative", the surrender of an individual to an international criminal tribunal, in view of the special treaty rules applicable in that area.

13. The topic of expulsion of aliens deserved special attention for its timeliness, legal interest and practical relevance. Without calling into question the Commission's assessment that the topic was ripe for

codification and progressive development, her delegation wished to express its reservations about the decision to include in the scope of the topic the expulsion of refugees and stateless persons, since those issues had been directly addressed by the 1951 Geneva Convention on relating to the Status of Refugees and the 1954 Geneva Convention relating to the Status of Stateless Persons. Moreover, the expulsion of aliens in a situation of armed conflict was a matter covered by special provisions of international humanitarian law and hence should not be included in the topic. The task of codification should not become a legislative undertaking which, while pursuing legitimate aims, might undermine well-established conventional structures.

14. The second alternative in the revised version of draft article 1 was more satisfactory from a formal standpoint, although the term "*asilés*" appeared to be incorrect. With regard to the definitions given in draft article 2, the broad meaning given to the term "expulsion", which in French law was a procedure that only applied to aliens lawfully present in the territory, should not blur the distinction between aliens in a regular situation and those in an irregular situation in terms of the rules applicable to them. Defining "expulsion" not only as a legal act but also as conduct of a State was a decision that should be revisited in the light of the Commission's final conclusions on the legal regime of expulsion. A definition of "frontier" was not necessary.

15. Generally speaking, her delegation had no problems in principle with the draft articles with the exception of draft articles 5 and 6, which should not be part of the topic. There was no doubt, as set forth in draft article 3, paragraph 1, that a State had the right to expel an alien from its territory; that right derived directly from its sovereignty. However, paragraph 2 on compliance with international law should not be presented as an exception to the principle expressed in paragraph 1 but as a necessary consequence of the existence of that right. Paragraph 2 could be simplified, for example, by deleting the imprecise reference to "fundamental" principles of international law.

16. Although it might seem incongruous to include a provision on non-expulsion by a State of its nationals, as proposed in draft article 4, in a text concerned with expulsion of aliens, her delegation felt that it was a principle that deserved to be recalled.

17. The notion of collective expulsion contemplated in draft article 7 and its prohibition under customary international law in time of peace or of armed conflict certainly merited the Commission's attention. Paragraph 1 should not present as an exception to the principle the situation in which a State expelled concomitantly several aliens on the basis of individual decisions arrived at in accordance with the law, since such a case was not, strictly speaking, collective expulsion. Paragraphs 2 and 3 could also be more clearly worded.

18. **Mr. Bellinger** (United States of America) urged the Commission to bear in mind that the expulsion of aliens had sensitive legal and political implications and touched on national issues such as immigration, national security and respect for the rule of law. In that regard, he noted that draft article 3 both recognized the sovereign right of States to expel aliens and limited that right under international law.

19. He welcomed the Special Rapporteur's conclusion that denial of admission, extradition and aliens for whom expulsion was governed by special rules (such as diplomats and members of the armed forces) lay outside the scope of the topic; in his view, the issue of the expulsion of aliens in situations of armed conflict should also be excluded. His delegation agreed that there was no need for a specific article on migrant workers since they were covered by the general provisions. However, it remained concerned that the proposed definition of "territory" — "the domain in which the State exercises all the powers deriving from its sovereignty" (draft article 2 (2) (e)) — could be interpreted more broadly than the Special Rapporteur had intended. It would be preferable to define the term as "a State's land territory, internal waters and territorial sea, and its adjacent airspace, in accordance with international law".

20. His delegation welcomed the establishment of the Working Group on the effects of armed conflicts on treaties and commended it for taking an approach that did not rely on the intention of the parties in order to ascertain whether a treaty was susceptible to termination or suspension in the event of an armed conflict, or on a list of categories of treaties presumed to continue in operation during such a conflict. However, the effort to clarify the definition of the term "armed conflict" established in the Geneva Conventions was likely to cause confusion, as shown by the wide variety of views that had already been

expressed by delegations. A better approach would be to make it clear that the term "armed conflict" referred to the conflicts covered by common articles 2 and 3 of the Geneva Conventions (i.e., international and non-international armed conflicts). If it was decided to include "occupation" as well as "armed conflict", then the two terms should be dealt with separately since they were not synonymous under international law.

21. He supported the proposal that draft article 6 bis should be deleted and its subject matter reflected in the commentaries and considered that the draft articles should state clearly that international humanitarian law was the *lex specialis* that governed armed conflicts.

22. His delegation appreciated the Commission's desire to generate a common set of draft articles on the responsibility of international organizations, but it shared the concerns expressed about the underlying methodologies used; in particular, it had reservations regarding the assumption that the articles on State responsibility provided a good template for work on the new topic. The fact that both States and international organizations had international legal personality did not mean that they should be subject to the same basic rules of international law. States shared a fundamental set of qualities, but there was great diversity in the structure, functions and interests of international organizations. Moreover, many issues of concern to States — such as sovereignty, citizenship and territorial integrity — did not relate to international organizations.

23. He strongly supported the Commission's criteria for selecting new topics for its long-term programme of work, placing the highest priority on topics that were ripe for development and held the most promise for addressing the practical needs of States. He hoped that study of the topic "Protection of persons in the event of disasters" would focus on areas that would have the most significant impact on mitigating the effect of such disasters, including practical mechanisms to facilitate coordination among disaster assistance providers and access of people and equipment to affected areas. He also welcomed the Commission's decision to include in its programme of work the topic "Immunity of State officials from foreign criminal jurisdiction", which raised complex issues of domestic and international law.

24. However, he was not convinced of the appropriateness of the topic "Most-favoured-nation clause". Such clauses were primarily a product of treaty formation and tended to differ considerably in their structure, scope and language; they were also dependent on other provisions of the agreements in which they were included and therefore resisted categorization and study. He also questioned the inclusion of the topic "Subsequent agreement and practice with respect to treaties", which was potentially broad in scope and thus might not be suitable for progressive development and codification. Moreover, he was not aware of any pressing real-world issues that necessitated consideration of the topic at the current juncture; any such study would need to be conducted on a case-by-case basis.

25. **Ms. Lijnzaad** (Netherlands) said that while she appreciated the Commission's work, its website should be reorganized in order to make it more user-friendly.

26. Concerning the draft articles on the expulsion of aliens, although the revised texts of draft articles 1 and 2 were much clearer than their predecessors, she still wondered how draft article 1, which defined the scope of the provisions *ratione personae* and referred to nationals of the expelling State, related to draft article 4 on non-expulsion by a State of its nationals.

27. She welcomed the new text of draft article 2 on definitions; however, although the terms "stateless persons" and "refugees" fell within the definition of "alien" in the draft article, she believed that they merited separate definitions. Furthermore, the definition of "expulsion", which included extradition of an alien, was too broad. Reference might be made to the definition used by the European Court of Human Rights; in the case of A. B. v. Poland, the Court had determined that expulsion was involved when a person was obliged permanently to leave the territory of the State without being left the possibility of returning later.

28. She agreed with the Special Rapporteur's proposal to use the definition of "refugee" provided in the 1951 Geneva Convention relating to the Status of Refugees. The definition of the term "stateless person" in the draft articles should follow that of the Convention relating to the Status of Stateless Persons: "a person who is not considered as a national by any State under the operation of its law".

29. With regard to draft article 3 (on the right of expulsion), her delegation agreed that the right to expel aliens was inherent in State sovereignty, but that it was

regulated by instruments of international law to which the State might be a party and by rules of customary law.

30. With respect to draft article 4 (on the non-expulsion by a State of its nationals), she agreed with the Special Rapporteur that, as a general rule, a State could not expel its own nationals; the right of the individual to return to his or her own country was embodied in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and various regional instruments. Paragraph 3 of the draft article stated that a national expelled from his or her own country had the right to return to it at any time "at the request of the receiving State"; she urged the Special Rapporteur to clarify the legal basis for inclusion of that additional criterion, which was not found in contemporary human rights law.

31. The fact that asylum and statelessness were not comparable situations should be reflected in the wording of draft article 6 (on the non-expulsion of stateless persons). She agreed that stateless persons would have difficulty finding a host State and supported the Special Rapporteur's suggestion that the expelling State's intervention might be necessary. The effect of draft article 7 (on the prohibition of collective expulsion) depended largely on the interpretation of the word "collective". She welcomed the Special Rapporteur's view that the intent should be not to prohibit the expulsion of all aliens residing in a given State, but to prohibit any expulsion of aliens as a group; even in times of armed conflict, foreign nationals of enemy States, or of a State not a party to the conflict, should not be subject to collective expulsion. Individual aliens who demonstrated hostility towards the receiving State might be expelled, but only on the basis of a reasonable, objective case-by-case examination.

32. While recognizing the theoretical importance of the topic of the effects of armed conflicts on treaties, her delegation remained unconvinced of its timeliness. Recent armed conflicts had not given rise to major treaty law issues, nor had they caused major problems for States or international organizations acting as depositaries. Generally speaking, the Special Rapporteur's work seemed to be confined to the narrow issue of the suspension and termination of treaties. In reality, however, armed conflicts could raise other questions such as application of the *rebus sic stantibus* rule or the consequences of non-performance. Such a narrow approach suggested that many questions relating to the application of the 1969 Vienna Convention during situations of armed conflict would remain pending.

33. She welcomed the withdrawal of draft article 6 and the inclusion of new draft article 6 bis (on the law applicable in armed conflict), which reaffirmed the *lex specialis* character of the law of armed conflict in relation to human rights. A statement that the norms of customary international law maintained their legal force independently of treaties which might be affected by armed conflicts should also be included. The Martens Clause, which had prevailed for over 100 years, might be mentioned since it stipulated that in the absence of specific treaty rules, populations and belligerents remained under the protection and empire of the principles of international law, as they resulted from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.

34. Although it was true that the suspension or termination of treaties did not take place *ipso facto* and by operation of law, the reference in draft article 8 to articles 42 to 45 of the 1969 Vienna Convention, which provided a broad set of rules, seemed quite sweeping; further clarification of their applicability should be included in the commentary. It would be particularly useful to know the relevance of article 44 (on the separability of treaty provisions) and its implication for situations of armed conflict.

35. While welcoming the broader definition of "armed conflict" adopted by the Special Rapporteur, she stressed that such a definition inevitably required a higher degree of differentiation and detail. She reiterated her delegation's view that in relation to internal conflicts the position of third parties deserved consideration; a set of rules that covered both international and internal conflicts should strike a balance between the interests of the concerned parties, whether or not they were parties to the conflict.

36. The Commission's report, and particularly the Working Group's recommendations, set a high threshold for use of an internal armed conflict as grounds for suspension or termination of a treaty. The current text suggested that hostilities must reach a level of intensity beyond that required for the existence of such a conflict under international law in order for a

treaty to be suspended or terminated. Her delegation was not certain that a distinction between different types of internal armed conflict should be made or what it would imply; it would appreciate an explanation of the approach taken.

37. Turning to the topic of the responsibility of international organizations, she said that her delegation was in favour of the inclusion of draft article 43; there was no basis for requiring the members of an organization that were not responsible for an internationally wrongful act of the organization to provide compensation to a party injured by that organization where the latter was not in a position to do so. However, it was not clear whether the members had an obligation to provide the organization with funds so that it could cover its liability towards the injured party.

38. One option would be not to address that issue in the draft articles on the grounds that it was an internal matter for the organization. As a matter of principle, that approach was correct; the articles on State responsibility did not touch on the question of the internal mechanisms that would allow a responsible State to meet its obligation to pay reparation. In practice, however, international organizations were in a position fundamentally different from that of States in that regard; on a number of occasions, members had refused to meet their obligation to pay part of an organization's budget because they did not agree with the purpose for which the money would be spent. For practical reasons, and in order to promote the effectiveness of the draft articles, her delegation was in favour of the approach taken in draft article 43.

39. In reply to the question raised in paragraph 30 (a) of the Commission's report, she said that while her Government considered it highly unlikely that international organizations would commit a breach of an obligation owed to the international community as a whole, it could not rule out the possibility that they might do so. It would therefore be preferable to include in the draft articles a provision similar to article 48 of the articles on State responsibility. There did not seem to be any practice in that area, but it did not seem appropriate to grant every organization the right to make claims in such a case; the problem would be to establish criteria in that regard. It would seem that only organizations with competence in the area in which the breach had occurred should be entitled to claim against the organization responsible.

40. Concerning the question raised in paragraph 30 (b), although it was far from daily practice for international organizations to be injured and consider resorting to countermeasures, such a situation might occur. She saw no reason why the rules set forth in articles 49 to 53 of the articles on State responsibility could not be applied to international organizations in such a case.

The meeting rose at 11.15 a.m.